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DEFENSE RENEWAL OF MOTION FOR PARTICULARS

V.

MANNING, Bradley E., PFC

U.S. Army, (b) (6)

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

DATED: 6 April 2012

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this court, pursuant to R.C.M. 906(b)(6) and the Fifth, Sixth and Eighth Amendments to the United States Constitution to direct the Government to file the requested particulars for the 18 U.S.C. §641 offense.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

WITNESSES/EVIDENCE

3. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this court to consider the referred charge sheet in support of its motion.

LEGAL AUTHORITY AND ARGUMENT

4. The Government has opposed the Defense's request for particulars on whether the Government alleges that PFC Manning "stole" or "converted" under 18 U.S.C. §641. The Court ordered that the Defense provide the Government with authority that showed there was a difference between "stealing" and "converting" within the meaning of section 641. On 19 March 2012, the Defense sent the following email to the Court and the Government:

At the last 39(a), the Court requested the Defense to provide cases concerning the terms steal, purloin, and convert with regards to 18 U.S.C. §641. In this case, the Government

does not allege embezzlement. Instead, the Government alleges steal, purloin, or knowingly convert. Based upon the charged specification:

a) Steal: To steal property means to take someone else's property without the owner's consent with the intent to permanently deprive the owner of the value of that property. *Morrisette v. United States*, 342 U.S. 246, 270-71 (1952) ("Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. 'To steal means to take away from one in lawful possession without right with the intention to keep wrongfully.'") (citations omitted.)

b) Purloin: To purloin is to steal with the element of stealth, that is, to take by stealth someone else's property without the owner's consent with the intent to permanently deprive the owner of the value of that property. *Morrisette v. United States*, 342 U.S. 246, 270 (1952).

c) Conversion: To knowingly convert property means to use the property in an unauthorized manner in a way which seriously and substantially interfered with the government's use of the property, knowing that the property belonged to the United States, and knowing that such use was unauthorized. *Morrisette v. United States*, 342 U.S. 246, 271-72 (1952).

I believe that I understood the Government's position to be that there was no difference between steal and purloin. Thus, we are only dealing with steal or knowingly convert. Given the Supreme Court's clear pronouncement that there is a distinction between stealing and knowingly converting, the Defense requests that the Government provide clarification as to which theory it is alleging.

5. The Government did not respond to this email. Almost two weeks later, the Defense sent another email to the Government asking if it was planning on responding. The Government responded as follows:

In reference to the below email, we agree that under *Morrisette* the Court determined there may be slight variances between what constitutes stealing and knowing conversion. However, each federal circuits' jury instructions are different and some circuits treat the two similarly. We still do not believe the government is required to specify which theory we are alleging. The accused is on notice of both theories. This is still a matter best left for instructions. [Email from MAJ Fein, 2 April, 2012].

6. The Government acknowledges that the U.S. Supreme Court has determined that there is a difference between "stealing" and "converting" under section 641. However, according to the Government, because some circuits' pattern jury instructions treat the offenses similarly, it will not provide the requested particulars.

7. The Defense does not understand the Government's position. The Supreme Court has said that "stealing" and "converting" are two different offenses under section 641. *See Morrisette, supra*. But because the Government believes that some unspecified boilerplate jury instructions treat the offenses similarly, this is cause to refuse to provide the requested particulars? Contrary

to the Government's belief, the instructions don't inform the law; rather, the law informs the instructions.

CONCLUSION

8. In light of the Government's (appropriate) concession that stealing and converting are two different things, the Defense requests that the Court order the Government to provide the requested particulars.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel